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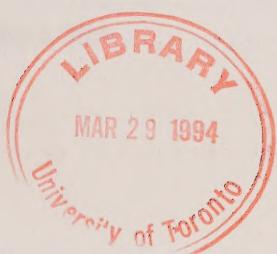
PRIVATE RIGHTS AND THE PUBLIC INTEREST UNDER CANADA'S *COMPETITION ACT*

Procedural Guarantees and the Independence of
the Director of Investigation and Research

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INTRODUCTION

The Director of Investigation and Research (Director) is an independent law enforcement official exercising considerable discretion in the administration of Canada's *Competition Act*¹ (Act). This discretion extends to a wide array of matters, ranging from the conduct of investigations to determining which cases give rise to enforcement action. In defining the parameters of the Director's authority, the Act recognizes that the flexibility necessary to competition law enforcement must operate with due regard to the concerns of private parties. This paper examines how the Act reconciles the public interest in competition with the protection of private rights in seeking a fair and effective enforcement of Canadian competition law.

While the Director derives his authority from the Act, the exercise of discretion within this statutory framework is further circumscribed by considerations of common and Constitutional law. Consequently, although the procedural safeguards in the statutory context constitute the primary focus of the paper, other sources of law, such as administrative and Constitutional law, must also be borne in mind. Administrative law operates to ensure that the Director acts within, and in furtherance of, his statutory mandate. Constitutional law, through the *Canadian Charter of Rights and Freedoms*² (Charter), provides a backdrop of fundamental rights which may serve a residual role in monitoring the Director's conduct, although many such Constitutional norms have been expressly incorporated into the machinery of the Act.

The Director's role is investigatory, not adjudicative. As a result, the procedural safeguards which inform the parameters of the Director's authority must be understood by reference to "decisions" within the Director's competence, such as the scope of search and seizure, treatment of confidential information and decisions not to proceed to enforcement action. Other procedural guarantees, such as rights to a hearing and representations, are afforded through the adjudicative process. Since many competition law enforcement decisions are made by the Director prior to reaching litigation, the safeguards in the pre-litigation stage are also of significance.

Following a brief discussion of the Director's independence, this paper is divided into two parts recognizing that the Director's exercise of authority may affect two essentially opposite groups. Part One deals with those under investigation for conduct contrary to the Act: persons subject to an inquiry or search and potential defendants or respondents (henceforth referred to collectively as "defendants"). Conversely, Part Two focuses on those potentially harmed by conduct contrary to the Act: complainants and other victims (henceforth referred to collectively as "complainants"). The complainants' perspective also entails a consideration of the scope of private action. As will be seen, the Act seeks to heed

¹ R.S.C., 1985, c. C-34, as amended. Section references are to the *Competition Act* unless otherwise indicated.

² Being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

the different concerns of defendants and complainants, while at the same time giving due regard to the public interest in the promotion of competition.

INDEPENDENCE OF THE DIRECTOR

The Director of Investigation and Research is an independent law enforcement official responsible for the administration and enforcement of the Act. He is appointed by, and serves at the pleasure of, Cabinet.³ The Director's mandate is to promote competition in Canada and is defined by reference to the purpose clause of the Act:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

The Act provides for both criminal offences and "reviewable" civil matters. The criminal offences are set out in Part VI of the Act and include conspiracy, bid rigging, predatory and discriminatory pricing, price maintenance, misleading advertising and other deceptive marketing practices. Civil "reviewable" practices are found in Part VIII of the Act and include matters such as abuse of dominant position, refusal to deal, exclusive dealing and merger review.

In considering the independence of the Director, it is necessary to understand his respective relationships to the various institutions involved in the enforcement of Canadian competition law. These include the Attorney General of Canada (Attorney General), the courts, the Competition Tribunal (Tribunal), the Minister of Consumer and Corporate Affairs⁴ (Minister) and the Bureau of Competition Policy (Bureau).

The Director is responsible for carrying out investigations, be they with respect to the criminal or civil provisions. Evidence of criminal matters is referred to the Attorney General of Canada for consideration of prosecution before the criminal courts. With regard to civil matters, the Director makes applications to the Tribunal for various remedial orders designed to preserve competition.

³ S. 7.

⁴ In June of 1993, the Federal government was re-organized and the duties and responsibilities of the Minister of Consumer and Corporate Affairs have now been assumed by the Minister of Industry.

The Tribunal is a quasi-judicial tribunal which operates at arms length of the Director.⁵ Whereas the Director's role is investigatory, the Tribunal's is exclusively adjudicative. It was newly created in 1986 with a view to developing special expertise in competition matters. The Tribunal consists of judges of the Federal Court, Trial Division, as well as lay members.⁶ It sits in panels comprised of both judicial and lay members, with only judicial members deciding questions of law.⁷ The Tribunal's structure has been upheld as respecting the Constitutional right to a hearing by an independent and impartial tribunal.⁸

The Director has a reporting relationship with the Minister whereby the Director submits an Annual Report to the Minister, who in turn causes the Report to be laid before Parliament.⁹ The Minister also has certain statutory powers to compel action by the Director. He may instruct the Director to undertake an inquiry, to provide an interim report with respect to an inquiry, or to make further inquiry where a matter has been discontinued.¹⁰ The Director may also be directed to make representations before other federal boards,¹¹ such as the National Transportation Agency and the Canadian Radio-television and Telecommunications Commission. Conversely, the Minister has no power to compel the Director to discontinue an inquiry. Further, and most importantly, any decision to apply to the Tribunal or to refer a matter to the Attorney General is the Director's alone.¹²

Members of the Bureau constitute the Director's staff. In taking enforcement action, Bureau members act as authorized representatives of the Director. The Bureau itself has no independent statutory existence. At an administrative level, the Bureau operates subject to the general financial and administrative control of government.

TRANSPARENCY

Prior to examining the procedural guarantees contained in the Act, it should be noted that transparency in the application of the law has always been a key objective of the

⁵ *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2d Supp.).

⁶ *Competition Tribunal Act*, s. 3.

⁷ *Competition Tribunal Act*, ss. 10, 12.

⁸ *A.G. Canada v. Alex Couture Inc. et al.*, (9 September, 1991), Québec 200-09-000250-909 (Que. C.A., leave to S.C.C. refused).

⁹ S. 127.

¹⁰ Pages 11-13, below.

¹¹ S. 125.

¹² Pages 13-16, below.

Director. A compliance program has been developed to educate the public as to how the Act operates both at a general level and in specific instances.¹³ The Director has issued enforcement guidelines that describe the agency's enforcement policy in relation to merger review,¹⁴ predatory pricing,¹⁵ price discrimination¹⁶ and misleading advertising.¹⁷ There is also an active public education program in place focussing on speeches and information sessions. In addition, the Annual Report to Parliament provides a record of enforcement action under the Act each year. Although these mechanisms of accountability do not vest private parties with legal rights, they do provide a benchmark against which the Director's actions may be measured.

At a more case specific level, the compliance program includes a system of advisory opinions whereby the Director invites parties to request an opinion on whether the implementation of a proposed business plan or practice would be consistent with the Act. In providing an opinion, the Director does not seek to reach a final decision as to legality, but rather to indicate whether the proposal, if implemented, would cause an inquiry to be initiated under the Act.¹⁸ In the context of merger review, the Act establishes a formal process whereby the Director may issue an advance ruling certificate indicating to parties to a proposed transaction that he does not have sufficient grounds on which to apply to the Tribunal for a remedial order.¹⁹ Such a certificate has effect with respect to the information upon which the certificate is based.²⁰

¹³ Director of Investigation and Research - *Competition Act, Compliance Bulletin*, (Ottawa: Consumer and Corporate Affairs Canada, 1993).

¹⁴ Director of Investigation and Research - *Competition Act, Merger Enforcement Guidelines* (Information Bulletin No. 5) (Ottawa: Consumer and Corporate Affairs Canada, 1991).

¹⁵ Director of Investigation and Research - *Competition Act, Predatory Pricing Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1992).

¹⁶ Director of Investigation and Research - *Competition Act, Price Discrimination Enforcement Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1992).

¹⁷ Director of Investigation and Research - *Competition Act, Misleading Advertising Guidelines* (Ottawa: Consumer and Corporate Affairs Canada, 1991).

¹⁸ The significance of the inquiry process is discussed at pages 11-13, below.

¹⁹ S. 102.

²⁰ S. 103.

I. RIGHTS OF DEFENDANTS - PROCEDURAL SAFEGUARDS WITH RESPECT TO THE DIRECTOR'S INVESTIGATORY POWERS

While the Director enjoys necessary latitude in deciding how to most effectively conduct investigations, the exercise of authority is circumscribed by important procedural safeguards. These arise particularly in two contexts. First, the Director may only gather information, unless voluntarily provided, in compliance with strict mechanisms set out in the Act. Second, any information so obtained must be accorded confidentiality as provided for in the Act.

1. Information gathering powers

The Act prescribes certain formal compulsory means of obtaining evidence: written returns of information; production of records; oral examinations; and searches. In each of these situations, the Act sets out procedural mechanisms designed to protect the rights of those from whom the evidence is obtained.

(a) Written returns, production of records and oral examinations

The Director may apply *ex parte* to a judge of a superior or county court or of the Federal Court for an order requiring any person to provide the Director with a written return under oath²¹ or to produce a record.²² Such an order has effect anywhere in Canada.²³ While the Director has latitude to define the information required, such an order will be made only where the issuing judge is satisfied that an inquiry²⁴ is being made and that the person required to provide the return or records has or is likely to have information relevant to the inquiry.²⁵ In the case of production of a record, the Act establishes a process to ensure that claims to solicitor-client privilege are respected.²⁶

The Director may similarly apply *ex parte* to a judge for an order requiring any person to attend and be examined orally.²⁷ As in the case of written returns or record production, the judge must be satisfied both of the existence of an inquiry and of the likelihood that the

²¹ S. 11(1)(c).

²² S. 11(1)(b).

²³ S. 11(4).

²⁴ "Inquiry" is a formal process which is commenced on the initiative of the Director, or upon request by the Minister or six Canadian residents. See pages 11-13, below.

²⁵ S. 11.

²⁶ S. 19(1). See p. 7, below.

²⁷ S. 11(1)(a).

person to be examined has relevant information. A person being examined is entitled to representation by counsel.²⁸ Also, a person whose conduct is the subject of an oral examination may attend the examination, unless to do so would prejudice the inquiry or result in the disclosure of confidential information.²⁹

The Act provides specifically that individuals supplying oral testimony or written returns are protected from self-incrimination. Any evidence obtained through these means "shall not be used or received against that individual in any criminal proceedings thereafter instituted against him" other than with respect to perjury.³⁰

The corresponding information gathering powers under the predecessor *Combines Investigation Act*³¹ were subject to constitutional challenge in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*.³² The Supreme Court rejected a claim that these powers violated the right to fundamental justice and the right against unreasonable search and seizure, guaranteed respectively by sections 7 and 8 of the *Charter*.³³

(b) Search and Seizure

The search and seizure provisions of the Act were considerably modified in the 1986 amendments to the Act to strengthen the protection afforded to parties being searched. This represented a response to the Supreme Court of Canada decision in *Hunter v. Southam Inc.*,³⁴ which held that the former search procedures, under the *Combines Investigation Act*, violated the constitutional guarantee against unreasonable search and seizure. Basic procedural safeguards are now in place with relation to both search and seizure.

The Act establishes general search procedures for searching premises³⁵ as well as specific procedures designed to address the increasingly complex issues associated with

²⁸ S. 12(3).

²⁹ S. 12(4).

³⁰ S. 11(3).

³¹ S.C., 1974-75-76, C. 76, s. 17.

³² [1990] 1 S.C.R. 425.

³³ See comments by L. Hunter, "Investigation Powers under Combines Investigation Act Upheld", *Canadian Competition Policy Record*, (1990) vol. 4, no. 2, pp. 3-6.

³⁴ [1984] 2 S.C.R. 145.

³⁵ S. 15.

searching computer systems.³⁶ Absent exigent circumstances, a search may only proceed where a warrant has been issued by a judge of a superior or county court or of the Federal Court. Warrants may be issued for civil and criminal matters, including misleading advertising. Upon *ex parte* application by the Director, the judge must be satisfied that there are reasonable grounds to believe that a criminal offence has been or is about to be committed, that reasonable grounds exist for the issuance of a Tribunal order or that there has been non-compliance with an order issued under the Act. The issuing judge must also be satisfied that reasonable grounds exist to believe that relevant evidence will be found on the premises to be searched.³⁷ This warrant process parallels the Criminal Code process followed by police forces generally. The exception for warrantless searches in exigent circumstances is confined to situations where delay in obtaining a warrant would result in the loss or destruction of evidence.³⁸

The seizure of documents is subject to basic procedural safeguards. The Director must take any seized record or thing, or a report of such record or thing, before a judge as soon as is practicable.³⁹ Only where the judge is satisfied that the record or thing seized is required for an inquiry will he authorize the Director to retain it.⁴⁰ The Act does not indicate that a searched person is entitled to notice of, and participation in, a retention hearing, nor have the courts required such notice where the Director intends only to retain copies rather than originals.⁴¹ Retained records must normally be returned within sixty days of the day when retention was authorized.⁴² A person from whom a record has been seized or produced is entitled to a reasonable access to the record.⁴³

The Act establishes a process to give effect to claims of solicitor-client privilege. Any person about to examine, copy or seize a record must afford a reasonable opportunity for claims of solicitor-client privilege.⁴⁴ Where a claim is made in respect of records which are

³⁶ S. 16.

³⁷ S. 15(1).

³⁸ Ss. 15(7)(8).

³⁹ S. 17(1)(2).

⁴⁰ S. 17(3).

⁴¹ *Cottrell Transport Inc. v. Director of Investigation and Research*, Ont. H. Ct., October 9, 1987 [unreported].

⁴² S. 18(4).

⁴³ S. 18(2).

⁴⁴ S. 19(7).

about to be examined, copied or seized⁴⁵ or produced pursuant section 11,⁴⁶ the record must be sealed and placed in the custody of a public official or agreed upon third party.⁴⁷ Claims of privilege are determined by a judge of a superior or county Court or of the Federal Court.⁴⁸

In addition to the protections provided for in the Act, any person who has been subjected to unreasonable search and seizure within the meaning of section 8 of the Charter may apply to a court of competent jurisdiction to have evidence so obtained excluded pursuant to section 24 of the Charter on the basis that its admission would bring the administration of justice into disrepute.

2. Protection with respect to disclosure of information

The Act is mindful of concerns about privacy and confidentiality. Inquiries must be conducted in private⁴⁹ and there are restrictions on the disclosure of confidential information. Also, where information is sought pursuant to access to information legislation,⁵⁰ a statutory law enforcement exemption allows the Director to withhold disclosure.

(a) Section 29

The Act expressly addresses the issue of the disclosure of confidential information as follows:

29.(1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

- (a) the identity of any person from whom information was obtained pursuant to this Act;
- (b) any information obtained pursuant to section 11, 15, 16 or 114;
- (c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; or

⁴⁵ S. 19(2).

⁴⁶ S. 19(1).

⁴⁷ S. 19(3).

⁴⁸ S. 19(4).

⁴⁹ S. 10(3).

⁵⁰ *Access to Information Act*, R.S.C., 1985, c. A-1, as amended.

(d) any information obtained from a person requesting a certificate under section 102.

Section 29 prohibits disclosure of the identity of informants, as well as of information received pursuant to formal investigatory powers, or upon notification or request for an advance ruling certificate in the merger context. This general prohibition is subject to two exceptions: (i) communications to a Canadian law enforcement agency; or (ii) communications "for the purposes of the administration or enforcement of this Act." Section 29 does not address certain types of information routinely obtained by the Director, such as that which is voluntarily provided in a compliance context. The section also does not apply in respect of any information that has been made public, such as that contained in material filed in support of a warrant application which has not been sealed by the court.⁵¹ The ensuing discussion examines the scope of the two exceptions, as well as the treatment of non-section 29 information.

(i) "Canadian law enforcement agency"

This exception permits the Director to disclose information to federal or provincial law enforcement agencies where evidence regarding enforcement of other laws is uncovered during an inquiry or co-operative enforcement action is being taken with other federal or provincial law enforcement agencies.

(ii) "The purposes of the administration or enforcement of this Act"

Section 29 ensures that, excepting disclosure to Canadian law enforcement agencies, information obtained pursuant to the formal means envisioned in the Act will only be disclosed for "the administration or enforcement of the Act". Although this exception might be examined in several contexts, the remarks below are confined to an issue of particular relevance in an increasingly globalized economy - disclosure of information to foreign competition authorities.

The pressures of globalization have heightened the need for international cooperation among competition law authorities. The Director joins antitrust officials of various jurisdictions in recognizing the many challenges posed by confidentiality concerns in the international business arena. The Director is currently seeking to develop, in consultation with the Canadian competition bar and business community, an approach to disclosure which appropriately accommodates the importance of confidentiality without sacrificing meaningful enforcement of competition law. In that regard, the remarks below are intended to outline a few of the many issues which bear consideration and do not constitute a definitive policy approach - the matter is under active consideration.

In the Canadian context, information disclosure to foreign competition authorities would be permissible to the extent that it is "for the purposes of the administration or enforcement

⁵¹ S. 29(2).

of the Act." Disclosure to a foreign antitrust authority may be considered to be for "the purposes of the administration or enforcement of the Act" where such disclosure will likely result in assistance which will further the Director's investigation. For example, this could occur where, as a result of disclosing to American antitrust authorities information on a particular matter, the Director is able to receive information which aids enforcement of the Act with respect to that same matter.

The Director's staff is conscious of the need to preserve confidential information and to limit any disclosure to that information critical to the advancement of an investigation. As a result, disclosure occurs only on a "need to know" basis and where other options have been exhausted. Furthermore, the degree of disclosure is limited to the minimum necessary to advance the investigation.

International agreements entered into by the Canadian Government have not altered the scope of section 29. Such agreements include both a treaty and a memorandum of understanding with the United States,⁵² as well as an OECD Council recommendation⁵³ regarding antitrust cooperation.

(b) Non-section 29 information

Much of the information routinely acquired by the Director is not addressed in section 29. For example, the Director seeks to facilitate timely and efficient compliance with the Act by encouraging parties to voluntarily provide information about practices and transactions which may raise issues under the Act.⁵⁴ While section 29 protects the identity of informants, its purview does not extend to the information supplied, except where obtained pursuant to the means formally set out in the Act.

Where information provided is not covered by section 29, parties may seek to obtain assurances of confidentiality from the Director. When considering such requests, the Director is mindful of the competing interests which come into play when deciding how to most effectively enforce the Act. In weighing these interests, the Director must give due regard to his responsibility as the public's "guardian of the competition ethic,"⁵⁵ as well as to the

⁵² *Treaty between the Governments of Canada and the United States of America on Mutual Legal Assistance in Criminal Matters* (1985); and *Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Laws* (1984).

⁵³ Organisation for Economic Co-operation and Development, *Revised Recommendations of the Council concerning co-operation between Member countries on restrictive business practices affecting international trade* (1986).

⁵⁴ Note 13, above.

⁵⁵ Note 79, below.

pivotal role which the Act plays as "a central and established feature of Canadian economic policy."⁵⁶

II. RIGHTS OF COMPLAINANTS - PROCEDURAL SAFEGUARDS WITH RESPECT TO "NON-ENFORCEMENT" DECISIONS BY THE DIRECTOR

From the perspective of defendants, decisions by the Director to proceed with an inquiry, to refer a matter to the Attorney General for criminal prosecution or to make an application to the Tribunal for a remedial order, are not at common law final decisions determinative of rights. The litigation process affords defendants procedural guarantees designed to ensure a fair hearing prior to any order being issued against their interest.

Conversely, a decision to not proceed to any of these stages is determinative of the matter from the perspective of complainants. The ensuing discussion examines the procedural guarantees designed to protect complainants from "under-enforcement" by the Director. The extent to which private action may serve to supplement public enforcement will also be considered.

1. Public Enforcement

(a) Inquiry

The Act provides for a formal inquiry process which provides procedural safeguards with respect to both defendants and complainants. On the one hand, as discussed earlier, the inquiry is a necessary precondition to invoking the formal information gathering powers set out in the Act, thereby protecting defendants from arbitrary use of investigatory powers. On the other hand, as examined below, complainants may invoke the inquiry process to oblige the Director to undertake investigations.

i) *Compelling an Inquiry*

The Director is required to commence an inquiry in any one of three situations. First, an inquiry must be commenced where he believes on reasonable grounds that a criminal offence has been or is about to be committed, that grounds exist for a Tribunal order or that there is non-compliance with an order under the Act.⁵⁷ Second, the Director must commence an inquiry upon direction by the Minister.⁵⁸

⁵⁶ *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606.

⁵⁷ S. 10(1)(b).

⁵⁸ S. 10(1)(c).

Third, and most importantly from the perspective of complainants, the Act establishes a process whereby private parties can compel the Director to commence an inquiry. Six Canadian residents may file an application with the Director setting out the nature of the conduct alleged to be contrary to the Act as well as supporting evidence.⁵⁹ Upon receipt of the application, the Director must commence an inquiry. The six-resident procedure also offers greater accountability to private parties in that the six residents have standing to be informed of the progress of an inquiry and of the grounds for discontinuance.⁶⁰

Where a complainant seeks to compel an inquiry solely on the basis that the Director has the requisite reasonable grounds to believe, it may be necessary to demonstrate the impracticability of using the six-resident process contemplated by the Act. Judicial review to compel performance of a statutory duty is a discretionary remedy and is normally confined to cases "where no other more suitable remedy is available."⁶¹

ii) Accountability during inquiry

Once commenced, the Director is required to cause the inquiry "to be made into all such matters as he considers necessary to inquire into with the view of determining the facts."⁶² The Act hereby acknowledges that latitude in the inquiry stage is an important component to effective enforcement of competition law. Courts will not normally compel the manner of performing a duty where Parliament has expressed a policy choice in favour of vesting a public official with discretion regarding how best to carry out his mandate.⁶³ In this regard, the role of the Director as the guardian of the public interest in competition has been unequivocally confirmed by the Supreme Court of Canada.⁶⁴

Although providing for flexibility at the inquiry stage, the Act also recognizes a countervailing need for accountability. The Director must, where requested by any person who has filed a six-resident inquiry request, or any person who is the subject of an inquiry, inform that person of the progress of the inquiry.⁶⁵ In addition, the Minister may at any

⁵⁹ Ss. 9, 10(1)(a).

⁶⁰ Page 13, below.

⁶¹ *Lee v. Canada (Secretary of State)*, (1987) 16 F.T.R. 315 at 318 (F.C.T.D.).

⁶² S. 10(1).

⁶³ *North Vancouver v. National Harbours Board* (1978) 89 D.L.R. (3d) 704, 712 (F.C.T.D.), cited in *Distribution Canada Inc. v. M.N.R.* (1990) 46 Admin. L.R. 34, 41 (F.C.T.D.).

⁶⁴ Note 79, below.

⁶⁵ S. 10(2).

time during an inquiry require the Director to submit an interim report setting out the action taken, the evidence acquired and the Director's view of the evidence.⁶⁶

iii) Discontinuance of Inquiry

An inquiry may be discontinued where the Director considers that no further inquiry is justified.⁶⁷ A written report to the Minister explaining the reasons for the discontinuance must be provided.⁶⁸ Similarly, six-resident applicants must also be informed of the grounds for the discontinuance.⁶⁹ In addition, a ministerial review procedure is established whereby:

The Minister may, on written request of applicants under section 9 or on the Minister's own motion, review any decision to discontinue an inquiry and may, if in the Minister's opinion the circumstances warrant, instruct the Director to make further inquiry.⁷⁰

The review mechanism allows for some measure of political accountability while entrusting to the Director the ultimate responsibility for enforcement of the Act.

(b) Proceeding to litigation

As a result of an inquiry, the Director may determine that he has sufficient basis upon which to either refer evidence of a criminal matter to the Attorney General of Canada for prosecution or make an application to the Tribunal for a remedial civil order. With respect to certain practices, there is overlap between the criminal and civil provisions in the Act such that the Director has some discretion to elect to proceed by reference to the Attorney General or by application to the Tribunal. For example, a criminal practice of predatory pricing or price discrimination may also give rise to a civil proceeding based on abuse of dominant position. This overlap and resulting discretion does not infringe the constitutional guarantee against vagueness in the law.⁷¹ In certain areas of potential overlap, however, the Act nonetheless requires the Director to elect only one mode of proceeding.⁷²

⁶⁶ S. 28.

⁶⁷ S. 22(1).

⁶⁸ S. 22(2).

⁶⁹ S. 22(3).

⁷⁰ S. 22(4). Where the Minister had not exercised his discretion fifty-five days after a discontinuance to compel the Director to make further inquiry, an application for mandamus was struck out, although only on the basis that it was premature given the complexity of the case - *Austin v. Minister of Consumer and Corporate Affairs*, (1987) 12 C.P.R. (3d) 190 (F.C.T.D.).

⁷¹ Note 56, above, pp. 644-645.

⁷² Ss. 45.1, 79(7) and 98.

i) Prosecution by the Attorney General before the Courts

The Director refers evidence of criminal matters to the Attorney General according to the following statutory relationship:

The Director may at any stage of an inquiry under section 10, in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been committed against this Act and for such action as the Attorney General may wish to take.⁷³

It is to be noted that the Director's referral is only with respect to matters under the Act. Any decision to take action with regard to matters outside the Act lies solely within the Attorney General's discretion. In particular, if the evidence referred by the Director discloses evidence of other criminal offences, the Attorney General is free to take "such action" as he deems appropriate with respect to such other offences.

The Attorney General's prosecutorial discretion in relation to instituting and conducting criminal prosecutions under the Act parallels that which exists in criminal law generally.⁷⁴ In the face of prosecutorial discretion to not proceed, complainants harmed by conduct they consider contrary to the criminal provisions of the Act may look to the private civil action provision of the Act.⁷⁵

ii) Application by the Director to the Tribunal

Part VIII of the Act sets out the jurisdiction of the Tribunal to issue remedial orders in respect of "reviewable" civil matters. With two exceptions, the Tribunal's jurisdiction to consider issuing an order is engaged only "on application by the Director." The first exception concerns applications to the registration of specialization agreements, which may be brought by the person seeking registration.⁷⁶ The second allows any person affected by a Tribunal order to apply to have the order varied in light of changed circumstances.⁷⁷

The Act does not specify the basis upon which the Director decides whether to apply to the Tribunal. Parliament has clearly chosen to vest discretion with the Director. This may be contrasted to the decision to commence an inquiry which the Director must make where

⁷³ S. 23(1).

⁷⁴ S. 23(2).

⁷⁵ Pages 16-18, below.

⁷⁶ S. 86.

⁷⁷ S. 106.

the requisite grounds to believe exist. In *American Airlines Inc. v. Canada (Competition Tribunal)*,⁷⁸ the Federal Court of Appeal described the Director as "the guardian of the competition ethic and the initiator of Tribunal proceedings under [Part VIII] of the *Competition Act*." In the same matter, the Competition Tribunal characterized the Director's discretion as follows:

It was open to Parliament to allow anyone potentially aggrieved by a merger to commence a proceeding before the Tribunal against the merging parties, but Parliament elected not to do so. Instead it obviously saw the commencement of such a proceeding and its direction as a matter involving an important public interest which was to be defined and pursued by the Director, a public officer, as he thinks best in the public interest.⁷⁹

In light of this clear policy choice, it is unlikely that a decision not to proceed to the Tribunal could give rise to judicial review as long as the Director is acting "as he thinks best in the public interest." Courts will not interfere with an exercise of discretion merely because the court might have exercised the discretion in a different manner.⁸⁰ Further, if the "decision" to not apply is signalled by discontinuance of an inquiry, then it is apparent that the appropriate recourse is by way of ministerial review of the decision to discontinue.

The independence of the Director with respect to bringing matters before the Tribunal should not be viewed as necessarily opposing the interests of complainants. As the Director's decision is not subject to ministerial override, the Director acts independently with the sole guiding criteria being the promotion of competition and consumer welfare. This discretion stands in contrast to the procedural constraints operating earlier at the inquiry stage. The interplay between the inquiry stage safeguards and the subsequent "prosecutorial" discretion strikes a balance between the private concerns of complainants and the public interest in effective enforcement of the Act.

2. Private Action - Section 36

The Act supplements public enforcement by providing complainants the following right of private action:

36. (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

⁷⁸ [1989] 2 F.C. 88, aff'd [1989] 1 S.C.R. 236.

⁷⁹ Tribunal reasons cited by F.C.A. in [1989] 2 F.C. 88, 94. The F.C.A. reversed the Tribunal decision on other grounds, but did not dispute the proposition that "the Director must have carriage of the proceedings under the *Competition Act*" (p. 97).

⁸⁰ *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2.

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(a) Constitutionality

Until 1989, uncertainty surrounded the constitutional validity of section 36. The issue centered on whether a civil damages cause of action was *ultra vires* the Parliament of Canada as encroaching on the authority of the provinces over property and civil rights. In *City National Leasing Ltd. v. General Motors of Canada Ltd.*⁸¹ and *Quebec Ready Mix Inc. v. Rocois Construction Ltd.*⁸² the Supreme Court of Canada upheld the Act as within the federal power over "trade and commerce." In so doing, the Supreme Court of Canada stressed the important role of private action in supplementing public enforcement of the Act:

Section 31.1 of the *Combines Investigation Act* [predecessor to section 36 of the *Competition Act*] is also fundamentally integrated into the purpose and underlying philosophy of the *Combines Investigation Act*. There is a close congruence between the goal of enhancing healthy competition in the economy and s. 31.1 which creates a private remedy dependent for its effectiveness on individual initiative. The very exercise of the remedy in s. 31.1 by a company against a competitor whose behaviour has transgressed the code of conduct established by the Act may be said to reflect and promote the spirit of competition informing the *Combines Investigation Act*.

Together or apart, the civil, administrative, and criminal actions provide a deterrent against the breach of the competitive policies set out in the *Act*. In this respect s. 31.1 is part of a legislative scheme intended to create "a more complete and more effective system of enforcement in which public and private initiative can both operate to motivate and effectuate compliance."⁸³

(b) Availability of private action

The removal of constitutional uncertainty should provide impetus to the use of private action in the functioning of the *Act*. Just how far section 36 will supplement public enforcement, thereby living up to the important role envisioned for private action by the Supreme Court of Canada, remains to be seen. The ensuing comments are intended only to briefly highlight some of the unique aspects of section 36 which will bear consideration as

⁸¹ [1989] 1 S.C.R. 641.

⁸² [1989] 1 S.C.R. 695.

⁸³ [1989] 1 S.C.R. 641, 684-686.

complainants explore the bounds of private action.⁸⁴ Due to infrequent use to date, the parameters of section 36 remain largely uncharted.

(i) Scope

The action is directed at "conduct that is contrary to" Part VI, the criminal provisions of the Act, or to contravention of an existing Tribunal order. While a conviction is not a prerequisite to pursuing a section 36 claim,⁸⁵ where there exists a conviction for an offence under Part VI or a conviction or punishment for contravention of a Tribunal order, the record of such prior proceedings constitutes *prima facie* evidence of conduct contrary to Part VI or of a contravention of a Tribunal order.⁸⁶

(ii) Equitable relief

While section 36 provides an action for damages, the absence of express reference to equitable relief appears to have left open the question of whether injunctions could be available.⁸⁷ In the only decided case to date, the Federal Court held that section 36 does not extend to injunctive relief.⁸⁸ However, this decision has been subject to the criticism that such equitable relief should be available before the courts.⁸⁹ Furthermore, the Federal Court has since refused to strike out a pleading for injunctive relief on the basis that the availability of equitable relief is a "debatable legal issue".⁹⁰

⁸⁴ For a more comprehensive consideration of the subject, see G. Leslie and S. Bodley, *the Record of Private Actions Under Section 36 of the Competition Act*, Canadian Bar Association Conference, October 1, 1993, Vancouver, B.C., and the accompanying bibliography.

⁸⁵ *Ely Lily and Co. v. Marzone*, [1977], 29 C.P.R. (2d) 254 (F.C.T.D.), aff'd 29 C.P.R. (2d) 255 (F.C.A.).

⁸⁶ S. 36(2).

⁸⁷ This is to be contrasted to the situation in the United States where s. 16 of the *Clayton Act* authorizes preliminary or permanent injunctive relief in private litigation.

⁸⁸ *ACA Joe International v. 147255 Canada Inc.* (1986), 10 C.P.R. (3d) 301 (F.C.T.D.).

⁸⁹ N. Finkelstein and R. Kwinter, "Competition Act, RSC 1985, 2nd Supp., C. 19-Section 36 and Claims to Injunctive Relief", (1990) 69 Can. Bar Rev. 298. See also comments of P. Glossop and J.T. Kennish, "Private Civil Actions in Canadian Competition Law - Recent Developments", *European Competition Law Review* (1991) vol. 12, issue 6, 237 at 240-241.

⁹⁰ *Industrial Milk Producers Association v. British Columbia Milk Board*, (1989) 21 C.P.R. (3d) 33, 51 (F.C.T.D.).

(ii) Burden of proof

While the proof of damages occurs on a civil balance of probabilities, the appropriate burden of proof with respect to the initial determination of "conduct that is contrary to" a criminal provision is an unresolved issue. Being a "civil" action, it may be that the of proof of conduct "contrary to" a criminal provision need only be established on the civil balance of probabilities, rather than on the criminal standard of proof beyond a reasonable doubt. However, where a civil matter involves serious allegation of criminal conduct, courts have considered the gravity of the consequences in deciding whether the allegations have been proven.⁹¹

(iv) Other considerations

The Act limits the bringing of an action to two years from the later of: (i) the day on which criminal conduct was engaged in (or a Tribunal order was contravened); and (ii) the day of the final disposition of criminal proceedings related thereto.⁹² The effect of this provision may be to revive an expired limitation period where the Attorney General subsequently takes up a matter.

Unlike section 4 of the *Clayton Act* which provides for treble damages, section 36 allows for single damages only. In regard to costs, the availability of contingency fees in Canada is limited to certain provinces and there is no provision for preferential cost awards. However, there is the possibility of receiving full costs which are significantly higher than in normal litigation.

CONCLUSION

The *Competition Act* establishes a system of checks and balances wherein the promotion of the public interest in competition must be reconciled with the protection of private rights. The Director plays a pivotal role as the "guardian of the competition ethic" in furthering the public interest through the exercise of enforcement discretion. The Act also recognizes, through private action, that the interests of private parties may often coincide with, rather than oppose, the public interest in a competitive marketplace. Lastly, to the extent that private action is limited, the Director plays an all the more important role in safeguarding the public interest in maintaining and encouraging competition in Canada.

⁹¹ *Hanes v. Wawanese Insurance Co.*, [1963] S.C.R. 154; *Goldshlager v. Royal Insurance Co. Ltd.*, (1978), 19 O.R. (2d) 166 (H.C.J.); *Lomas v. DiCecca* (1978) O.R. (2d) 605 (H.C.J.).

⁹² S. 36(4).